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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. [redacted]2 31

LOS ANGELES BUILDING AND CONSTRUCTION TRADES COUNCIL, and Its Agent, LLOYD A. MASHBURN; MILLWRIGHTS AND MACHINERY ERECTORS, LOCAL 1607, OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. L., and Its Agent, HERMAN BARBAGLIA,

Petitioners,

vs.

HOWARD F. LEBARON, Regional Director of the Twenty-first Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

MAURICE J. NICOSON,
520 Story Building,
Los Angeles 14, California,

ARTHUR GARRETT,
538 Maple Avenue,
Los Angeles 13, California,
Counsel for Petitioners.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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LOS ANGELES BUILDING AND CONSTRUCTION TRADES COUNCIL, and Its Agent, LLOYD A. MASHBURN; MILLWRIGHTS AND MACHINERY ERECTORS, LOCAL 1607, OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. L., and Its Agent, HERMAN BARBAGLIA,

Petitioners,

vs.

HOWARD F. LEBARON, Regional Director of the Twenty-first Regional of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Los Angeles Building and Construction Trades Council, and Its Agent, Lloyd A. Mashburn; Millwrights and Machinery Erectors, Local 1607, of the United Brotherhood of Carpenters and Joiners of America, A. F. L., and Its Agent, Herman Barbaglia, petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on December 8, 1950.

Opinions Below.

The opinion of the United States District Court for the Southern District of California [R. 83-104] is reported at 84 Fed. Supp. 629. The opinion of the Court of Appeals [R. 265-266] is reported in 185 F. 2d 405.

Jurisdiction.

The judgment of the Court of Appeals was entered on December 8, 1950. [R. 265-266.] Petition for rehearing [R. 268] was denied on January 5, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1250(1).

Questions Presented.

1. Whether or not Section 8(b)(4)(D) of the National Labor Relations Act, as amended, which prohibits a union and its members from withdrawing their services from an employer, or from the labor market to win from an enemy union or from non-union employees, contested work opportunities or to refuse to perform services for an employer, in such a situation, is unconstitutional and void because it deprives the unions and their members of rights guaranteed by the First, Fifth and Thirteenth Amendment to the Constitution of the United States.

2. Whether or not the injunction, affirmed by the court below, preserves to the petitioners and their members the rights guaranteed by the First, Fifth and Thirteenth Amendments to the Constitution of the United States.

3. Whether or not the injunction, affirmed below, preserves to the petitioners and their members the rights guaranteed by Section 8(c) of the National Labor Rela-

tions Act, as amended, in failing to exclude from its prohibitions acts which do not involve threats of reprisals or force or promises of benefits.

4. Whether or not the trial court, affirmed by the court below, had jurisdiction to entertain a petition for injunction, within the time allowed for voluntary compliance with a Determination of the National Labor Relations Board arising under proceedings purported authorized by Section 10(k) of the National Labor Relations Act, as amended.

5. Whether or not Section 10(k) is unconstitutional and void as constituting a system of compulsory arbitration in contravention of the Fifth Amendment to the Constitution of the United States, as taking property without due process of law.

Statute Involved.

The pertinent statutory provisions are printed in Appendix A, *infra,* pages 1 to 4.

Statement.

Upon charges and amended charges [R. 14-24] filed by the International Association of Machinists, a labor organization, Respondent, Howard F. LeBaron, as Regional Directors of the Twenty-first Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, filed a petition for injunction under Section 10(1)[1] of the National Labor Relations Act, as amended, in the United States District Court for the

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[1]61 Stat. 136, 29 U. S. C. 160(1), Supp., 1949.

Southern District of California, on May 3, 1949 [R. 2-37], seeking relief, pending a final adjudication by the National Labor Relations Board, of a matter then pending before the National Labor Relations Board arising out of the allegations of the above mentioned charges to the effect that petitioners were engaged and had engaged in violations of Section 8(b)(4)(D)[2] of the National Labor Relations Act, as amended. Upon the filing of the petition for injunction the District Court issued, upon petitioners, a rule to show cause why, pending final adjudication by the National Labor Relations Board, with respect to the allegations of the charges, petitioners and each of them should not be enjoined and restrained, as prayed for in the petition for injunction. [R. 37-38.]

Petitioners, on May 16, 1949, filed their Return to the Rule to Show Cause [R. 39-81], in which they and each of them denied that the District Court had been conferred jurisdiction to hear and decide the matter by Section 10(1) of the National Labor Relations Act, as amended; that the acts and conduct complained of did not amount to unfair labor practices within the meaning of Section 8(b)(4)(D) of the National Labor Relations Act, as amended; that the allegations of the petition for injunction were untrue; that the National Labor Relations Act, as amended, did not constitutionally confer upon the National Labor Relations Board, jurisdiction to hear or determine matters presented by the aforementioned charges in that Section 10(k) of the National Labor Relations Act was unconstitutional and void; and that Section 8(b)(4)(D) of the National Labor Relations Act, as amended, was

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[2]61Stat. 136, 29 U. S. C. 158(b)(4)(D), Supp., 1949.

unconstitutional and void because such section contravenes the First, Fifth and Thirteenth amendments to the Constitution of the United States in that such section denies freedom of speech and assembly, takes property without due process of law, and compels involuntary servitude.

The District Court heard the matter upon the affidavits filed and upon argument of counsel. The facts, as found by the District Court, so far as they are pertinent here, are as follows:

The Southern California Edison Company (hereinafter referred to as Edison), a public utility, is engaged in furnishing electrical energy and services to Los Angeles and Southern California. A substantial portion of its output goes to instrumentalities of interstate commerce and concerns engaged in interstate commerce. Edison purchases substantial quantities of materials and electrical energy originating outside the State of California.

During the period covered by the charges, Edison was engaged in the construction and equipping a new steam turbine electric power generation station at Redondo Beach, California, with an estimated cost in excess of $38,000,000.00, a substantial portion of which was purchased and transported from points outside of the State of California. [R. 84.]

In the process of this construction and equipment, Stone & Webster, a building construction corporation (herein called Stone & Webster), was the general contractor for the construction and equipment of the station and had approximately 550 of its employees working on the project. These employees were all members of the constituent unions comprising the Los Angeles Building and

Construction Trades Council, one of the petitioners herein. [R. 85.] In addition, Edison had contracted with Westinghouse Electric Corporation (herein called Westinghouse), for the furnishing and installation of several steam turbine generators, at this project. [R. 85.]

In January, 1949, Westinghouse began the installation of one of the turbine generators and in this installation employed and used persons who were members of the International Association of Machinists. [R. 85.]

Petitioner, Millwrights and Machinery Erectors, Local 1607, of the United Brotherhood of Carpenters and Joiners of America, A. F. L., had traditionally represented persons engaged in this type of work and sought to have its members employed in such pursuits on the construction project.

On February 2, 1949, a dispute arose as to whether jurisdiction over this installation work should be assigned to members of the Millwrights Union or to persons who were members of the International Association of Machinists, a labor organization which had been expelled from the American Federation of Labor. Resultant of this dispute was that members of petitioners, all affiliated with the American Federation of Labor, withdrew their services both for Stone & Webster and for Westinghouse, declining to work with what they considered non-union persons, thereby engaging in a "strike or concerted refusal, in the course of their employment, to transport, or otherwise handle or work on" Westinghouse products or to perform services for their employers in connection with the project. The District Court found that a similar

strike or refusal to work on Westinghouse products occurred on April 11, 1949.

The object of these "strikes," the District Court found, was to require Westinghouse and Stone & Webster to "assign the work of installing the steam turbine generators, at the Redondo Beach, California, station, to members of Millwrights and Machinery Erectors, Local 1607, of the United Brotherhood of Carpenters and Joiners of America, A. F. L., rather than to the employees of Westinghouse who were members of the International Association of Machinists. [R. 85-86.] Only two members of the International Association of Machinists were involved and upon their being withdrawn from the disputed work, by Westinghouse, the "strikers" returned to their various tasks and proceeded to and did complete their assigned tasks. The disputed work, however, was not renewed or completed until after the issuance of the injunction here under attack.

On May 11, 1949, the National Labor Relations Board, after a hearing conducted purportedly under Section 10(k)[3] of the National Labor Relations Act, as amended, issued its "Determination of the Dispute" [R. 229-242], in which the Board concluded that petitioners were not lawfully entitled to force or require Westinghouse to assign the disputed work on installation of steam turbine generators at the Redondo Beach Plant to members of

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[3]61 Stat. 136, 29 U. S. C. 160(k), Supp., 1949.

the Millwrights Union rather than to employees of Westinghouse who were members of the International Association of Machinists.

Upon these findings, the District Court, on June 8, 1949, entered its decree by which petitioners and each of them were enjoined from "*engaging*, or *inducing* or *encouraging* the employees of Stone & Webster, Westinghouse or any other employers, to *engage in a strike or concerted refusal, in the course of their employment*, to use, manufacture, process, transport or otherwise handle or work on any goods, articles or materials belonging to or utilized by Stone & Webster, Westinghouse, or any other employers engaged on the Renondo Beach project, where an object thereof is to force or require Westinghouse and/or Stone & Webster to assign the work of installing steam turbine generators to members of petitioner Millwrights, rather than to members of the International Association of Machinists, or any other labor organization, unless the Millwrights are first certified as the bargaining representative of the employees performing such work . . ." [R. 121-123.] (Emphasis added.)

Petitioners, within the proper time filed their appeal from this judgment and decree to the United States Court of Appeals for the Ninth Circuit [R. 123], which court heard the matter *en banc* and on December 8, 1950, by a *per curiam* opinion, affirmed the district court. [R. 265-267.] A petition for rehearing was denied, *en banc*, on January 5, 1951. [R. 268.]

Specification of Errors to Be Urged.

The court below erred in holding that:

1. Section 8(b)(4)(D) of the National Labor Relations Act, as amended, did not contravene the First, Fifth and Thirteenth amendments to the Constitution of the United States.

2. The injunction of the District Court was issued upon sufficient evidence.

3. Respondent had shown probable cause, sufficient to apply for an injunction.

4. Respondent had reasonable cause to believe that the charges were true and that a complaint should issue thereon.

5. The trial court had jurisdiction to entertain a petition for injunction within the time allowed by the statute and the Rules and Regulations of the Board, for voluntary compliance with the "Determination of the Dispute" under Section 10(k).

6. The injunction properly restrained and enjoined petitioners from striking in protest of unfair labor practices committed by Westinghouse and the International Association of Machinists in violation of Section 8(a)(1), 8(a)(3), 8(b)(1) and 8(b)(2) by engaging in and administering an illegal closed shop contract.

7. The injunction was not broader that the dispute involved and determined by the National Labor Relations Board.

8. The injunction did not compel members of petitioners to work against their will and desires and that the injunction did not prohibit such members from withholding their skills and services when working conditions were not consonant with union precepts and members' dignities.

9. Section 10(k) of the National Labor Relations Act, as amended, was constitutional and a proper exercise of the congressional powers under the Commerce Clause of the Constitution of the United States.

10. Section 10(k) constitutionally empowered the Board to engage in compulsory arbitration and that it does not take property without due process of law.

11. The injunction was properly limited to *pendente lite* relief because that injunction determined finally the issues presented by the charges against petitioners and grants full and final relief against them without trial or hearing.

Reasons for Granting the Writ.

This case presents important questions of construction of the National Labor Relations Act, as amended, which have not been, but should be, decided by this Court. This case further presents questions of the constitutionality of provisions of that act.

The Statutory Scheme.

1. Section 8(b)(4)(D)[4] of the National Labor Relations Act, as amended, seeks to prohibit a labor organization from *engaging in* or *inducing* or *encouraging employees of any employer* to engage in a *strike* or *concerted refusal to work* on any goods, materials or articles or *to perform services* where an object thereof is to compel an employer to assign particular work tasks to one union membership group rather than to another union membership group. These types of cases were usually termed jurisdictional disputes.

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[4]61 Stat. 136, 29 U. S. C. 158(b)(4)(D), Supp., 1949.

Whenever it is charged that a labor organization is engaged in these prohibited acts, the National Labor Relations Board is empowered by Section 10(k)[5] to hear and *determine* such dispute, unless the parties to the dispute, after notice of the charges, submit to the Board satisfactory evidence that they have voluntarily adjusted the dispute. If no such submission is made, the Board proceeds to hold a hearing, not upon the merits of the charge, but merely upon the question as to which union membership is entitled to do the work in controversy. After such hearing the Board issues its "Determination of Dispute" in which it sets forth which of the disputants is entitled to the assignment of the disputed tasks. (See Rules and Regulations of the National Labor Relations Board, as amended, Section 103.74, set forth in the Appendix, p. 4.)[6]

"Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, *such charge shall be dismissed.*" (Section 10(k), *supra.*) (Emphasis added.) Until the Board has made its determination and the question of compliance it set at rest no complaint, charging unfair labor practices can legally be issued. Upon compliance the matter ends and the Board *must* dismiss the charges.

Section 10(1)[7] of the National Labor Relations Act, as amended, requires certain agents of the National Labor Relations Board to make investigation of such charges, mentioned above, and if such agent has reasonable cause

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[5]61 Stat. 136, 29 U. S. C. 160(k), Supp., 1949.

[6]Section 103.74, 14 F. R. 78.

[7]61 Stats. 136, 29 U. S. C. 160(1), Supp., 1949.

to believe that the allegations of the charge are true and that a Board complaint, alleging unfair labor practices should issue, such agent is required to petition the appropriate district court of the United States for injunctive relief pending the final adjudication of the Board with respect to such charged unfair labor practices. Under this latter section, respondent sought and obtained a decree prohibiting petitioners and its members from refusing to work under conditions which they felt were abhorrent to them and which undermined the security and efficacy of the unions' memberships.

Under Section 10(k) (*supra*), the agent of the Board cannot know that a complaint should issue until after the Board has "determined" the dispute, for upon compliance with such determination, the charge must be dismissed, leaving no basis for the issuance of any complaint. (*Los Angeles Building and Construction Trades Council, et al.*, 88 N. L. R. B. No. 241.)

Free Speech Issues.

1. There are now pending before this Court, petitions for writs of certiorari in three other cases involving some of the questions here presented. *Local 74, United Brotherhood of Carpenters v. National Labor Relations Board,* No. 85 this term (Certiorari granted, 340 U. S. 902); *International Brotherhood of Electrical Workers v. National Labor Relations Board,* No. 108 this term (Certiorari granted, 340 U. S. 902); and *National Labor Relations Board v. Denver Building & Construction Trades Council,* No. 393 this term (Certiorari granted, 340 U. S. 902).

The instant case brings here several important questions not urged before this Court in those cases. Those cases deal with the constitutionality of the statutory provisions of the National Labor Relations Act, as amended, which forbid picketing in so-called secondary boycott situations. The instant matter deals with the right of speech, assembly and communication *in the absence of any picketing situation,* and involves, primarily, the withdrawal, or the right of withdrawal of services of employees when and where conditions, under which members of petitioning unions are called upon to work, are not such as the unions and their members care to submit themselves to perform their skills and callings.

Section 8(b)(4)(D) (*supra*) and the decree of the district court which parrots the language of that section, inhibits petitioners and their members from withdrawing services, skills and trade practice because, simply, they do not care to work with members of an ancient rival or with non-union personnel. (See *U. S. v. Hutchison,* 312 U. S. 219.) Not only is the personal right to select working conditions, under which they will consent to work, enjoined, but the counsel, advice, aid and discussion of the petitioners members and their elected officers are prohibited, under the guise that such advice, counsel, aid or discussion would amount to encouraging or inducing member employees to withhold their services, at least until the objectionable working conditions are corrected or adjusted to the satisfaction of the member employee.

Section 8(c)[8] of National Labor Relations Act, as amended, provides that expression of *views, arguments* or *opinions* or *the dissemination thereof* shall not constitute

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[8]61 Stat. 136, 29 U. S. C. 158(c), Supp., 1949.

or be evidence of an unfair labor practice, "under *any provision of this Act,* if such expression contains *no threat of reprisal or force or promises of benefit.*" (Emphasis ours.)

The legislative history of Section 8(c) forecloses any possible contention that the section was intended to afford lesser protection to communication or expression than the First Amendment. Dissatisfaction with the scope of protection given communication under court, as well as Board interpretations of the First Amendment, lead Congress to the enactment of this section. (*80th Congr. 1st Sess.*, pp. 23-24, 93 Cong. Rec. 4893.) The congressional purpose of this enactment was to prevent the frittering away, by the decisional process, the guaranties inherent in the First Amendment.

The instant case presents, squarely, the issue of the applicability of section 8(c), for here, even the trial court found no *threats of reprisals or force or promise of benefit* made by any of the petitioners. Here there was no picketing or picket line, simply a refusal to work under abhorrent conditions of work. In the absence of threats of reprisals or force or promise of benefit, arguments, expressions of view or opinion do not constitute a violation of any provision of this Act and are immunized by the Guaranties of the First Amendment. (*National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U. S. 469.)

Under the constructions of the courts below, the statutory protection is disregarded and petitioners as officers and representatives of their constituent members may not communicate, advise, or speak upon their rights, or the functional coherence of petitioners, for to do so would amount to inducing or encouraging the constituent member-

ship to withdraw and withhold their skills and services, even though the conditions of work are against the best interests of the membership or against the basic fundamentals of petitioners. Such conduct would run afoul the statutory prohibitions and the decree of injunction. Indeed, it is doubtful whether or not petitioners can safely explain, to their memberships, those basic fundamentals, let alone requesting or suggesting that such fundamentals be observed. For to so do may *induce* or *encourage* some of the memberships to refuse their services and thus to offend the proscriptions of the section.

It is idle *in extremis* to consider that Congress intended to or could take away the guaranties of the First Amendment by the enactment of section 8(c) or that the section applies only to employers and not to labor unions or organizations. (93 Cong. Rec. 4020.) To the same effect see, H. Conf. Rep. No. 510, 80th Cong. 1st Sess., p. 45; H. Rep. No. 245, 80th Cong. 1st Sess., pp. 6, 33; S. Rep. No. 105, 80th Cong. 1st Sess., p. 23; 93 Cong. Rec. 4893, 6443, 6859. The declination of the courts below to accord to this section the full intention of Congress requires prompt review by this Court.

If Section 8(c) does not immunize the conduct here involved, then the constitutionality of Section 8(b)(4)(D) becomes a compelling issue for review and decision of this Court in the proper administration of the National Labor Relations Act, as amended, and in the public interest.

The court below affirmed the district court's decree upon the authority of its own decisions in *Printing Specialties and Paper Converters Union v. Le Baron*, 171 F. 2d 331; *Building & Construction Trades Council v. Le Baron*, 181 F. 2d 449, and *Hughes v. Superior Court*, 339 U. S. 460;

Teamsters Union v. Hanke, 339 U. S. 470, and *Building Service Union v. Gazzam*, 339 U. S. 532.

The inapplicability of all these decisions, except *Building & Construction Trades Council v. Le Baron*, is readily observed from the consideration that each of them involved the regulation of picketing activities, which are absent here.

The case of *Printing Specialties and Paper Converters Union v. Le Baron, supra*, a secondary boycott picketing issue presents the same questions as are involved in *United Brotherhood of Carpenters v. National Labor Relations Board, supra; International Brotherhood of Electrical Workers v. National Labor Relations Board, supra*, and *National Labor Relations Board v. Denver Building & Construction Trades Council, supra; Building & Construction Trades Council v. Le Baron, supra*, is a preliminary decision of the court below upon a petition to stay the decree of the lower district court, and in which the court below expressly reserved decision on the merits.

In the *Gazzam* case, the decision of the Supreme Court of Washington had been based on the fact that the picketing therein had lost its protection since that picketing had stepped over the line from persuasion to coercion. (*Gazzam*, 339 U. S. at 536.) In the *Hughes* case, this Court upheld the right of a state to restrain picketing where picketing went beyond "the aspect of mere communication as an appeal to reason. (*Hughes*, 339 U. S. at 468.) And in the *Hanke* case this Court observed that the picketing involved there foreclosed the use of property and concluded that the "ingredient of communication" present in the picketing did not save it from state regulation. (*Hanke*, 339 U. S. at 473, 474, 477.) These three

cases turned upon the interjection into the picketing, rights believe to be secured by other constitutional provisions.

Here such actions and conduct of the petitioners, could, at their very worst, amount to no more than attempts to persuade to action. This Court recognized in the *Gazzam*, *Hughes* and *Hanke* cases that, even as to an objective made unlawful by the state, picketing could only be banned when other channels of communication remained open to the unions. (*Hanke*, 339 U. S. at 477.) Section 8(b)(4)(D) blocks all channels of communication, *i. e.*, inquiries of union agent as to working conditions, notice to members of undesirable working arrangements and persuasive efforts, not accompanied by threats of reprisals or force, or promise of benefit, to observe the fundamental traditions of self protection. This section and the decree below enjoins not only such communicative attempts but any related conduct.

Free trade in ideas is protected by the First Amendment and involves not only the freedom of expression but likewise encompasses the opportunity to persuade to action and not merely to describe the facts. *Thomas v. Collins*, 323 U. S. 516, 534-535, 537, 540; *De Jonge v. Oregon*, 299 U. S. 353, 365. Here not only, is persuasion to action proscribed, a like proscription extends to a description of the facts of the controversy. It was not by accident that the guaranties of freedom of speech were coupled with the right to peaceably assembly. *Thomas v. Collins, supra.* Under the language of the considered sections, an assembly called of the constituent membership is offensive to the statutory prohibitions, if the controversy is mentioned or discussed. The First Amendment gives freedom of mind the same security as the freedom of conscience. *Pierce v. Sisters, etc.*, 268 U. S. 510; *Meyer v. Nebraska*, 262 U. S.

390; *Prince v. Massachusetts*, 321 U. S. 158. The right, thus, to discuss and inform people concerning the advantages of unions and joining them is protected not only as a part of free speech, but as a part of free assembly. *Thomas v. Collins, supra*, at 532; *Hague v. C. I. O.*, 307 U. S. 496.

Compulsory Arbitration.

3. Section 8(b)(4)(D), *supra*, when read in connection with Section 10(k), *supra*, is invalid for still another reason in that it sets up and imposes a system of compulsory arbitration which deprives petitioners of property and liberty of contract without due process of law.

In *Wollf Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, there was involved the validity of the Court of Industrial Relations Act, of Kansas. That act vested in an industrial court power, upon its own initiative or upon complaint, to summons the parties and hear any dispute over wages or other terms of employment in any industry, and after hearing to fix wages or terms and conditions of employment. This Court, speaking through Chief Justice Taft, invalidated this portion of the Kansas statute for the reason that it curtailed the rights of the employer and employee to contract about their affairs. The Chief Justice pointed out that the parties were bound by the findings of the industrial court and the worker, while not required to work, was forbidden, under penalty of fine or imprisonment, to strike against the finding of the industrial court, and "thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows give him." The Chief Justice concluded by holding that the provisions of the act which gave the industrial court the power to summons the parties and to fix their working conditions de-

prived the parties of liberties of contract, which deprivation was constitutionally invalid.

In a subsequent case, *Dorchy v. Kansas*, 264 U. S. 286, this Court, speaking through Mr. Justice Brandeis, restated its conclusions reached in the *Wollf* case and again held that a system of compulsory arbitration violates the Federal Constitution.

In the instant case, there is no doubt that a section 10(k) proceeding, bottomed though it is on Section 8(b)(4)(D), is a system of compulsory arbitration. As originally written, section 10(k) provided for the appointment of an arbitrator to resolve jurisdictional disputes, but the word "arbitrator" was stricken in conference and the Board was substituted in the place of the "arbitrator." That it is a matter of arbitration is frankly conceded by Board members Murdock and Houston in their dissenting opinion in the Matter of *Juneau Spruce Corporation, infra*. It is not arguable that the mere substitution of the Board for the "arbitrator" destroyed the effect of the compulsory nature of this imposed arbitration.

In effect, this Court held in the *Wollf* and *Dorchy* cases that it is of no matter what the tribunal is called, it is the deprivation of the right to freely contract that this Court holds sacred and has stated may not be destroyed by legislative enactment.

Nor is it an answer to say that Section 10(k) is not compulsory arbitration because it allows an appeal by indirect means to test the validity of the determination thereunder. The Kansas statute also allowed an appeal in the Supreme Court of the state, but notwithstanding this protective device this Court held that the statute, as a deprivation of property and liberty was in contravention of the Federal Guaranties of the Fifth Amendment.

The Conflict of Decisions.

4. The decision of the court below in affirming the decree of the District Court as has been shown above, relied chiefly upon the *Gazzam, Hanke* and *Hughes* cases, and the court below, as has been pointed out, has misconceived and misapplied those three cases.

In addition there is the conflict between the decision reached here by the court below and the decisions of the courts of appeal in *Local 74, United Brotherhood of Carpenters, etc. v. National Labor Relations Board*, No. 85, this term, certiorari granted 340 U. S. 902; *International Brotherhood of Electrical Workers, Local 50 v. National Labor Relations Board*, No. 108, this term, 340 U. S. 902, and *National Labor Relations Board v. International Rice Milling Company*, No. 313, this term, 340 U. S. 902.

In addition to such conflicts of the courts of appeal there is a direct fundamental conflict between the decision reached by the court below and a three-judge district court composed of two circuit judges and one district judge in the *Stapleton v. Mitchel*, 60 Fed. Supp. 61.

In the *Stapleton* case the constitutionality of the statute of the State of Kansas was under attack as being in contravention of the First and Thirteenth Amendments. A portion of that statute, like the one here under consideration, made it unlawful for any person to refuse to handle, install, use or work upon particular materials or equipment or to cause any cessation of work or interfere with the progress of work by reason of any jurisdictional dispute, grievance or disagreement of, between or within labor organizations. The three-judge federal court held that this portion of the statute was unconstitutional and

void on its face and enjoined the enforcement of it.[9] In the course of the opinion in the *Stapleton* case that court pointed out that the existence and operation of the labor union necessarily involved the integrated, correlated and concerted activities of everyone connected with the organization "from the individual members to the highest official; that the activities of the individual member as he goes about his daily work preaching the doctrine of unionism is the heart and soul of the organization and without which it cannot exist. It is also established that the life and strength of the labor organization is dependent upon the free exercise of speech, press and assembly between all those who further its object, regardless of their status in relation to the organization. Its plan was that compliance with certain provisions of the Act is a condition precedent to the exercise of whatever rights are involved in the functioning of a labor organization and it is, of course, fundamentally found self-evident that free speech, press and assembly are sacred human liberties and their free exercise cannot be made to depend upon any condition imposed by state law, nor may they be previously restrained in the absence of danger to the community."

The conflict of that decision with the one under consideration becomes apparent when the analogies of the two situations are laid side by side. Under the section of the National Labor Relations Act now under consideration the life and strength of a labor organization dependant upon

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[9]The State of Kansas filed an appeal in this Court but the appeal was subsequently dismissed upon the stipulation of the parties.

free exercise of speech, press and assembly is throttled at its source. Compliance with this provision of the statute and the exercise of speech, press and assembly are conditioned and previously restrained by the statutory provisions 8(b)(4)(D). The individual members, and their highest officials are previously restrained from preaching the doctrine of unionism without which a labor organization cannot exist. The court below ignored or gave no credit to this plain and compelling decision of the three-judge district court which has never been overruled and stands today as a salutary expression upon the invalidity of statutes such as the one here provided. Not only did the three-judge district court in the *Stapleton* case hold the Kansas statute void as an infringement upon the guarantees of the First Amendment, but likewise struck down that statute because of the enforced servitude which the statute would compel and which would contravene the Thirteenth Amendment. Nor is it possible to say that the decision of the Tenth Circuit in *United Brotherhood v. Sperry,* 170 F. 2d 863, is a contradiction of the decision reached in the *Stapleton* case, even though Judges Huxman and Murrah participated in both decisions. It is significant to note that in reaching its decision in the *United Brotherhood v. Sperry, supra,* the 10th Circuit was not dealing with the exact problem presented in the instant case; that is, a jurisdictional dispute, so that the *Stapleton* case now represents the law in the Tenth Circuit at least with respect to the validity of any prohibitory enactments such as the one under consideration. We submit that the decision reached in the *Stapleton* case is more logical and

just and accords more nearly to the constitutional principles than the decision reached by the court below in the instant matter, and that this fundamental conflict of decision should be reviewed by this court in order that the various courts of appeal may be advised as to the proper consideration to be given under Section 8(b)(4)(D).

The Misapplication of the Decisions in This Court.

5. The decision of the court below is believed to be erroneous and moreover probably conflicts with the applicable decisions of this court.

As has been adverted to above, the court below bottomed its decision chiefly on this court's decisions in the *Gazzam*, *Hanke* and *Hughes* cases. In all three of these latter-mentioned cases this Court was concerned with acts and conducts of picketing and pickets, which acts and conduct this Court found were beyond the persuasive character of communication by means of picketing, which had theretofore been seemingly indicated to be immune along with the First Amendment's guarantees of communication by the picketing process. In these latter three cases this Court held, however, that picketing, while a means of free speech, could and did involve, in these three cases, acts and conduct which could not so be considered. That under such conditions states might enact laws or restrain picketing which involved means other than the constitutional guarantees of free speech and therefore sustained the actions of the states and the courts below in the restraint imposed upon the right to picket.

The court below, in relying upon these three decisions, has misconstrued and misapplied this court's decisions in those three cases. Here there were no acts of picketing whatever. Simply the workmen withdrew their services and skills from their employer because of conditions under which they did not wish to continue to work. There was no violence, no threats of reprisal or promises of benefit and certainly none of the pseudo coercive connections sometimes read by courts into the effect of picketing. The plain question here involved is whether or not workmen may withdraw their skills and services from an employer when the conditions of work become for any reason, undesirable to them and if they do withdraw their skills and services in protest of an abhorrent condition, whether the Congress by the passage of the presently considered statutory provision, has constitutionally set up a procedure through the injunctive process or otherwise to compel such workmen to proffer their skills and services against their wishes and better judgment. In the *Gazzam, Hanke* and *Hughes* cases no such questions were presented and we believe that the court below, in relying upon these three decisions, misconstrued and erroneously applied those three cases to the instant matter. This conclusion seems to be fully supported by the language of Mr. Justice Frankfurter (339 U. S. at 477), where he points out that while picketing involving illegal conduct may be restrained, other free channels of communication must be left open or else such a closing would be adverse to the guarantees of the First Amendment.

The Importance of the Questions Nationally.

6. Clearly the questions here presented are of importance to the administration of the National Labor Relations Act as amended. The decision of the court below if left to stand, will affect numerous like situations constantly arising in the field of labor relations. Since the passage of the amendments to the Act in 1947 the National Labor Relations Board has issued approximately 15 decisions[10] under the considered statutory provision. Other cases are now pending before the Board and like the instant matter, district courts have been called upon to lend their injunctive processes upon the filing of charges alleging jurisdictional dispute.

Other cases are now in varying stages before the Board or in the process of being presented to other courts of appeal to determine the constitutional and applicable questions involved in the statutory provision considered.

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[10]*Matter of National Union of Marine Cooks & Stewards, et al.*, 82 NLRB No. 107; *Matter of Moore Drydock Co.*, 81 NLRB No. 169; *Matter of Juneau Spruce Corp.*, 82 NLRB No. 71; *Matter of Brown v. Roofers & Waterproofers Union*, ... Fed. Supp. ....., 24 LRRM 2472; *Matter of Irwin-Lyons Lbr. Co.*, 82 NLRB No. 707; *Matter of L. A. Building Trades Council*, 83 NLRB No. 76; *Matter of Wells Mfg. Co.*, 85 NLRB No. 8; *Matter of Ship Scaling Contractors' Assn.*, 87 NLRB No. 14; *Matter of Carpenters & Joiners Union (Stroh Brewery)*, 88 NLRB No. 169; *Matter of Association of Motion Picture Producers*, 88 NLRB No. 102; *Matter of Carpenters & Joiners Union (New London Mills, Inc.)*, 91 NLRB No. 86; *Matter of Hod Carriers Union (Middle States Telephone Co.)*, 91 NLRB No. 99; *Matter of Fur & Leather Workers Union (Winslow Bros. & Smith Co.)*, 90 NLRB No. 188; *Matter of Sheet Metal Workers Intl. Union (Alber Milling Co.)*, 90 NLRB No. 174.

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

MAURICE J. NICOSON,
ARTHUR GARRETT,
Counsel for Petitioners.